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IN THE

Supreme Court of the United States

DAVID KAY AND DOUGLAS MURPHY,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
To the U.S. Court of Appeals
For the Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

I. The Government Concedes That The First Question Presented Is Certworthy, And There Is No Sound Reason For Further Delaying Its Resolution.

Though the Government concedes that the first question presented "has divided the courts of appeals and warrants this Court's review in an appropriate case" (BIO 8), it contends that this case does not provide a "suitable . . . vehicle for resolving the question" (*id.* 9) because if petitioners' indictment were very liberally construed, it might adequately allege the willfulness element of an FCPA criminal offense (*id.* 9-12). That was not the theory of the Fifth Circuit and the argument is wrong for three reasons.

First, although the Government contends the Fifth Circuit *could have* found the indictment sufficient by applying a liberal construction rule, there is no dispute that the court of appeals *actually* ruled on harmless error grounds. *See, e.g.*, BIO 12. The Fifth Circuit's focus on the evidence in the indictment reflects a classic application of harmless error analysis, akin to the observation that the trial evidence overwhelmingly supported a finding the jury did not make because of an erroneous charge. *E.g.*, *Neder v. United States*, 527 U.S. 1, 16-17 (1999). Indeed, the court's discussion of "harmless error" (Pet. App. 30a) would make no sense if the court had found no error in the first place.

Contrary to the Government's submission, the court of appeals' view that the indictment alleged facts from which the grand jury *could have* drawn an inference of willfulness provides no ground for find-

ing the indictment sufficient. The Constitution requires the Government to do more than plead evidence from which an element of the offense may be inferred. An indictment must "set forth expressly, fully, and clearly all elements necessary to constitute the offense" (*Morissette v. United States*, 342 U.S. 246, 270 n.30 (1952)), in order to "ensure that the grand jury has found probable cause that the defendant committed each element of the offense" (*United States v. Guzman-Ocampo*, 236 F.3d 233, 236 (5th Cir. 2000) (citation omitted)).

Second, the government's defense of the indictment largely repeats the very error embodied in the indictment's omission. The Government's "liberal construction" theory is that the indictment implicitly alleged such knowledge by describing "quintessentially dishonest conduct." BIO 11. Allegations of dishonest conduct might well suffice to satisfy the FCPA's "corrupt" intent element, which requires proof that the defendant acted with "a bad purpose or evil motive" (Pet. App. 123a (emphasis omitted)). Congress, however, reserved criminal sanctions for those defendants who act not only corruptly, but also willfully—*i.e.*, with the knowledge that their dishonest actions violated the law. 15 U.S.C. § 78ff(c)(2)(A); Pet. App. 130a; BIO 11 n.2. The absence of a willfulness allegation tracks the Government's incorrect position in the district court—abandoned on appeal (U.S. C.A. Br. 21)—that willfulness is *not* an essential element of an FCPA criminal offense, but rather is simply duplicative of the corrupt intent element. To now hold, as the Government suggests, that allegations of corrupt conduct also satisfy the willfulness

requirement would (like the indictment itself) essentially read the willfulness element out of the statute. *Cf. Arthur Andersen L.L.P. v. United States*, 544 U.S. 696, 705-06 (2005) (requiring independent satisfaction of "knowingly" and "corruptly" elements of obstruction of justice statute).

It is no answer to suggest that people should ordinarily assume that dishonest conduct abroad violates *U.S.* law. *See Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746, 1758 (2007) (noting the traditional "presumption that United States law governs domestically but does not rule the world"). The statute criminally punishes anyone who "willfully violates subsection[s]" of the FCPA itself (15 U.S.C. § 78ff(c)(2)(A)), not defendants who willfully violate any "law," foreign or domestic. Thus, nothing in the indictment even suggested, let alone required, that the grand jury determine whether petitioners acted willfully, with the knowledge that their conduct was unlawful.

Third, even setting aside the weakness of the Government's defense of the indictment, the possibility of an alternative ground for affirming a defendant's conviction has not prevented this Court from resolving certworthy harmless error questions in the past. To the contrary, this Court has frequently granted certiorari to decide such issues assuming, without deciding, the existence of error. *See, e.g., Fry v. Pliler*, 127 S.Ct. 2321, 2325 n.1 (2007); *Rose v. Clark*, 478 U.S. 570, 576 n.5 (1986); *United States v. Hasting*, 461 U.S. 499, 506 n.4 (1983). Particularly given the certworthiness of the second question presented, that would be an appropriate course in this case.

II. Certiorari Is Warranted To Review The Fifth Circuit's Holding That The Rule Of Lenity Is Inapplicable To The Ambiguous Terms Of The FCPA Because Legislative History Makes It Unnecessary To Literally "Guess" At The Statute's Meaning.

Petitioners were convicted and sentenced to multi-year prison terms under the FCPA for conduct the criminality of which, the Fifth Circuit conceded, was "ambiguous." Pet. App. 6a. This case presents an ideal vehicle to resolve two vital and recurring questions regarding the rule of lenity: (i) when, if ever, an ambiguous criminal statute can be construed to favor the government on the basis of legislative history; and (ii) whether the rule of lenity functions as nothing more than a tie-breaker, applicable only if a reviewing court is unable to do anything other than literally "guess" at the statute's meaning. The brief in opposition has no persuasive answer to the showing of the petition and two *amicus* briefs that this Court's review of both issues is warranted.

1. The Government's preliminary assertion that the rule of lenity is inapplicable because the FCPA's text is unambiguous lacks merit. The statute makes it a crime for an employee of a U.S. business to willfully and corruptly bribe a foreign official to induce official action that would "assist . . . in obtaining or retaining business for or with . . . any person." 15 U.S.C. §§ 78dd-1(a)(1), -2(a)(1). Although "the government does not consider the language to be ambiguous" (BIO 16 n.5), the seven judges who have considered this case correctly and *unanimously* found that "the statutory language *is* genuinely debatable

and thus ambiguous." Pet. App. 63a; *accord id.* 6a, 113a.

Though the Government's reading is consistent with one broad dictionary definition of "business" (BIO 13), the court of appeals correctly recognized that other common and narrower definitions of "business" render petitioners' conduct perfectly lawful: "[T]he word business can be defined at any point along a continuum from a 'volume of trade,' to 'the purchase and sale of goods in an attempt to make a profit,' to 'an assignment' or a 'project.'" Pet. App. 63a (quoting *Webster's Encyclopedic Unabridged Dictionary* 201 (1989)). The spectrum of potential meanings thus runs from a person who hopes to "improve his business" in terms of seeking to better his general economic performance to one who hopes to "receive the business" of a customer in terms of obtaining a particular relationship or contract. Notably, the limiting phrase, "for or with . . . any person" (15 U.S.C. § 78dd-1(a)(1)(B)) favors the latter interpretation. The statutory text is accordingly ambiguous.

The Fifth Circuit's choice of the broadest, government-favoring interpretation of "business" produced a startlingly sweeping interpretation of this frequently employed provision of federal criminal law—one that criminalizes all payments intended to have *any* positive effect on the company. Under that broad theory, the court of appeals was able to conclude that, because "[a]voiding or lowering taxes reduces operating costs and thus increases profit margins, thereby freeing up funds that the business is otherwise legally obligated to expend" (Pet. App. 74a), such conduct "assist[s] . . . in obtaining or retaining business"

within the meaning of the FCPA. The Government accordingly urges that criminal liability attaches whenever "the resulting savings benefit the company's existing business." BIO 13. The problem is that "[t]he same can be said about virtually any contact with a foreign official that somehow—and no matter how indirectly—enables the company to take some action that reduces costs or otherwise benefits it." Chamber Br. 15.

By contrast, on petitioners' and the district court's reading, the FCPA's business nexus requirement has a significant but nonetheless foreseeable scope. It prohibits bribes intended to secure public or private contracts or to secure permits that, for example, authorize sales in the host country. Pet. App. 112 n.3. The United States, for its part, points to nothing in the text that would justify adopting the former, Government-favoring and business-swallowing reading of the FCPA.[1]

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[1] The "very limited exceptions" to the FCPA (BIO 5 (quoting Pet. App. 77a)) cited by the Government exempt from liability, for example, payments made to secure expeditious approval of an import permit to which the defendant was entitled, while leaving intact the statute's prohibition against bribes designed to secure a permit to which the defendant had no legal right. This "grease payments" provision actually supports petitioners' reading of the FCPA, as it renders criminal payments made to induce an official "to award new business or to continue business with a particular party" (15 U.S.C. § 78dd-1(f)(3)(B)), a provision that uses the term "business" to refer to particular contractual arrangements, not the payor's general economic health. *See Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 86 (2006) ("identical words used in different parts of the same statute are . . . presumed to have the same meaning" (internal quotation marks omitted)).

2. The United States principally argues—and the Fifth Circuit held—that this case does not implicate the principle of lenity because legislative history supports a broad reading of the FCPA's business nexus requirement. BIO 14. That argument squarely presents a question that this Court has twice reserved and that should be answered in this case: "whether resort to legislative history is ever appropriate when interpreting a criminal statute." *United States v. Santos*, 128 S. Ct. 2020, 2025 n.3 (2008) (plurality opinion) (citing *United States v. R.L.C.*, 503 U.S. 291 (1992)).[2]

The rule of lenity fulfills the "the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly proscribed." *Santos*, 128 S.Ct. at 2025 (plurality opinion). Because the rule "'ensures that criminal statutes will provide fair warning concerning conduct rendered illegal, and because no one can plausibly conclude that a committee report or the floor statements of selected legislators provides such warning,

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[2] Contrary to the Government's footnoted assertion (BIO 14-15 n.3), that issue is squarely presented by this case. Petitioners relied extensively on the rule of lenity below. Further, the court of appeals expressly "passed upon" the relevance of legislative history (*see* Pet. App. 15a-18a; *Verizon Comm'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002))), and Fifth Circuit precedent precluded petitioners from arguing anything more than that legislative history should receive very little weight (*see* Pet. C.A. Br. 52-53; Pet. 22 (citing *United States v. Guidry*, 456 F.3d 493, 502 (5th Cir. 2006))). In any event, the Fifth Circuit relied on legislative history during the first appeal in this case–when petitioners' were *appellees*, under no obligation to have anticipated or preserved the argument.

the use of such material seems utterly incompatible with the purposes of the rule or the civilized interests it protects." *United States v. Laton*, 352 F.3d 286, 314 (6th Cir. 2003) (Sutton, J., dissenting); *see also* Pet. 32 & n.6. There is no basis for arguing, let alone assuming, that selective excisions from legislative history put petitioners on fair notice that their commonplace conduct in Haiti constituted a felony under U.S. law.

This case, moreover, starkly illustrates the dangers of construing ambiguous criminal statutes to impose criminal liability on the basis of legislative history. As detailed in the petition (Pet. 4-7, 29-30), the Fifth Circuit merely plucked from the legislative history snippets that supported its conclusion, "looking over a crowd and picking out [its] friends" (*Exxon Mobil Corp. v. Allapattah Svcs.*, 545 U.S. 546, 568 (2005)), while according no weight to strong legislative evidence to the contrary. Of particular note, Congress addressed the business nexus standard on three separate occasions—at the time of the statute's initial enactment, and in two subsequent amendments—and in *each instance* it declined to enact language that would have expressly criminalized petitioners' conduct. Pet. 28-29; *see also* Pet. App. 114a-20a. Especially in criminal cases, statutes should not be construed expansively based on "the discarded draft[s]" of legislation. *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 101 (1993); *see also* Pet. 28 (citing cases).

Nor can review be delayed due to the absence of a direct conflict in the circuits. No court of appeals can currently depart from this Court's approval of some

use of legislative history in construing criminal statutes (*see United States v. R.L.C.*, 503 U.S. 291, 298-99, 305-06 (1992) (plurality opinion)) and create a circuit conflict. Only this Court can resolve the question it has twice before reserved to clarify the independent role of legislative history (if any) in providing fair notice of criminal liability.

3. Certiorari is also warranted to resolve the existing circuit conflict—which the Governmental notably does *not* deny—over whether the rule of lenity applies when a criminal statute is ambiguous or only when its meaning is truly indeterminate such that a court can only "guess" at its meaning. The Fifth and Tenth Circuits strictly limit the lenity principle to the minuscule class of cases in which it is *literally* only possible to "guess" at a criminal statute's meaning. *See* Pet. 21-22. Thus, the Fifth Circuit held that the FCPA's ambiguity was insufficiently "extreme" to trigger lenity (Pet. App. 15a), because that court deems lenity "a last resort of interpretation" (*id.*) applicable only when all the tools of statutory construction leave the court no choice but to engage in "guesswork" regarding Congress's intent (*id.* 16a). By contrast, a well-settled body of precedents in other circuits squarely rejects the view that lenity is no more than a tie-breaker, holding instead that criminal statutes must be construed to favor defendants unless the government's construction is unambiguously correct. Under that rule, legislative history will rarely if ever provide the required clarity. *See* Pet. 22-25 (highlighting lines of authority in D.C. and Ninth Circuits); *see also United States v. Davenport*, 519 F.3d 940, 947 (9th Cir. 2008).

The better reading of this Court's precedents is that lenity requires resolving uncertainty in favor of the defendant, unless the statute unambiguously supports the government's interpretation. Although the United States invokes decisions employing the "no more than a guess" formulation (BIO 15), it fails to account for the petition's detailed showing that (contrary to the ruling below) those precedents did not intend that terminology to be taken literally, but in fact continue to adhere to the settled principles that lenity applies unless "the Government's position is unambiguously correct" (*United States v. Granderson*, 511 U.S. 39, 54 (1994)) and that, if "doubts remain, they must be resolved in accord with the rule of lenity" (*Bifulco v. United States*, 447 U.S 381, 400 (1980)). *See* Pet. 20-21. Certiorari is warranted because only this Court can resolve the inconsistency in its own precedents and bring uniformity to the decisions of the courts of appeals.

4. Finally, the brief of the U.S. Chamber of Commerce amply demonstrates that this Court's intervention is warranted because of the sweeping repercussions of the Fifth Circuit's ruling for businesses and the frequent recurrence of the question presented. *See also* Pet. 33-34. The Fifth Circuit's decision in this case marks a watershed expansion of FCPA enforcement. "In the wake of [the Fifth Circuit's decision in] *Kay*, there have been numerous FCPA actions predicated in part or in whole on payments made to reduce or avoid regulatory burdens, and many additional cases remain under investigation." Chamber Br. 18. The interpretation of the FCPA adopted below "transform[ed] what would be a

relatively minor violation under local law into potentially enterprise-threatening U.S. criminal liability" (Chamber Br. 2), and in so doing "greatly exacerbated compliance and investigative costs" (*id.* 20) and allowed the government "to force 'increasingly onerous settlements that companies are compelled to accept'" (*id.* 23 (quoting Claudius O. Sokenu, *FCPA Enforcement after* United States v. Kay: *SEC and DOJ Team Up To Increase Consequences of FCPA Violation*, *in* The Foreign Corrupt Practices Act: Coping with Heightened Enforcement Risks (Lucinda A. Low et al. eds., 2007))). Because of the paralyzing costs now entailed in disputing the admittedly ambiguous scope of the business-nexus requirement, *see* Chamber Br. 13-15, this Court's prompt intervention is warranted. Otherwise, businesses will have little choice but to bend to the tremendous pressure to settle such charges, thereby leaving little opportunity for clarification of the law in other circuits. *Id.* 16-17, 21-23.

The petition for certiorari should accordingly be granted. In addition, the Court may wish to consider granting the petition together with No. 08-108, *Flores-Figueroa v. United States*, or No. 08-5316, *Mendoza-Gonzalez v. United States*. Those petitions present the question whether an element of the crime of aggravated identity theft (18 U.S.C. § 1028A(a)(1)) is that the defendant knew the identification he used belonged to another person. The acknowledged circuit conflict over that question turns substantially on the circumstances warranting application of the rule of lenity (*see* Pet. for Cert., No. 08-108, at 10, 21, 27-28), and the cases together accordingly present this

Court with a unique opportunity to consider the application of the lenity principle in multiple contexts and to bring much needed clarity to this basic and frequently recurring issue. *See also* Pet. 24 (citing D.C. Circuit's ruling on aggravated identity theft question as exemplifying conflict over proper application of lenity)

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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